



Information Society Project  
Yale Law School

# **Intermediaries & Private Speech Regulation: A Transatlantic Dialogue**

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*Co-Hosted by the Yale Law School Information Society Project  
and the Stanford Center for Internet and Society*

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## **Overview**

On September 28, 2018, the Wikimedia/Yale Law School Initiative on Intermediaries and Information (WIII) hosted an intensive, day-long workshop entitled “Intermediaries and Private Speech Regulation: A Transatlantic Dialogue.” The Yale Information Society Project (ISP) and the Stanford Center for Internet and Society (CIS) co-hosted this event, with support from the Oscar M. Ruebhausen Fund at Yale Law School. This intimate, invitation-only academic workshop took place at Yale Law School.

For this workshop, WIII and CIS convened leading experts from the United States and the European Union for a series of non-public, guided discussions. Participants discussed the complicated issue of private speech regulation and the connections between platform liability laws and fundamental rights, including free expression.

This report presents a synthesized collection of ideas and questions raised by one or more of the experts during the event, providing an overview of theoretical ideas, practical experiences, and directions for further research on rapidly evolving questions of intermediary liability from a uniquely transatlantic perspective. Nothing in this report reflects the individual opinions of participants or their affiliated institutions.

## Themes<sup>2</sup>

Governments around the world are increasingly turning to private internet platforms as de facto regulators of internet users' speech. In the United States, newly enacted legislation has expanded internet intermediaries' liability for users' communications for the first time in two decades. In the European Union, the Commission has proposed making social media companies proactively monitor and remove user communications relating to terrorism. Pressure to combat violent extremism has already led to troubling errors – including platforms removing political speech, videos posted by human rights organizations, and users' discussions of Islamic religious topics.

One key theme for this workshop was whether constitutional and human rights frameworks place any limits on laws that will foreseeably lead private platforms to silence lawful speech. It may be possible for states to effectively bypass limitations on their own authority by deploying private companies without appropriate safeguards. This indirect regulation of speech would create a host of problems for individual rights. In the United States, few courts have had to confront these issues in the internet age. Older cases, though, have held that poorly formulated liability rules for “analog intermediaries,” such as bookstores, could violate the First Amendment.<sup>3</sup>

Courts and thinkers outside the United States have brought increasing attention to these questions in recent years. The Supreme Courts of India and Argentina both rejected intermediary liability rules that would incentivize cautious platforms to silence large swathes of lawful speech.<sup>4</sup> The European Court of Human Rights and Court of Justice of the European Union have both identified users' expression and privacy rights as limiting factors for platform liability rules.<sup>5</sup> The prevailing political winds in Europe, however, appear to favor ever increasing platform responsibility for eliminating unlawful content.

This event brought together a transatlantic group of scholars of constitutional and human rights law to discuss connections between platform liability laws and fundamental rights, including free expression. This discussion was particularly timely in light of developments ranging from the proposed E.U. Terrorist Content Regulation to Facebook's announcement of an external, multi-stakeholder ‘Supreme Court’ for content takedown decisions,<sup>6</sup> as well as likely litigation challenging the constitutionality of FOSTA – the first U.S. law in twenty years to substantially expand platforms' legal responsibility for user speech and developments in Europe around “illegal content online.”<sup>7</sup>

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<sup>2</sup> This section of the report borrows significantly from framing materials co-authored by Daphne Keller, with contributions from Martin Husovec and Joris van Hoboken.

<sup>3</sup> See, e.g., *Smith v. California*, 361 U.S. 147 (1959); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

<sup>4</sup> See, e.g., *Singhal v. India*, A.I.R. 2015 S.C. 1523; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/10/2014, “Rodríguez María Belén c/Google y Otro s/ daños y perjuicios” (Arg.).

<sup>5</sup> See Daphne Keller, *New Intermediary Liability Cases from the European Court of Human Rights: What Will They Mean in the Real World?*, CTR. FOR INTERNET AND SOC'Y (April 11, 2016), <http://cyberlaw.stanford.edu/blog/2016/04/new-intermediary-liability-cases-european-court-human-rights-what-will-they-mean-real> (last accessed Jan. 17, 2019).

<sup>6</sup> See Kate Klonick & Thomas Kadri, *How to Make Facebook's 'Supreme Court' Work*, N.Y. TIMES (Nov. 17, 2018). <https://www.nytimes.com/2018/11/17/opinion/facebook-supreme-court-speech.html>.

<sup>7</sup> See Allow States and Victims to Fight Online Sex Trafficking Act, H.R. 1865, 115th Cong. (2018).

# **Free Expression Protections and Intermediary Liability**

## **United States and Europe: Learning From Each Other**

American lawyers and legal scholars have much to learn from Europe concerning intermediary liability and speech regulation. First, while the United States has some case law concerning intermediaries and speech,<sup>8</sup> there is a much larger body of European case law concerning these issues. Participants suggested that U.S. lawyers can gain valuable knowledge, including practical litigation strategies, from European cases. Second, internationally, the United States is an outlier in the field of intermediary regulation. Few jurisdictions are even attempting to adapt or apply the intermediary regulation models of America's CDA 230 or First Amendment speech protections, generally.<sup>9</sup> Third, E.U. internet policy is only growing in influence and is shaping the development of global internet policy, as evidenced by the widespread application of the General Data Protection Regulation (GDPR). For these reasons and more, U.S. lawyers and legal scholars can and should learn from European perspectives and experiences on intermediary regulation, particularly concerning free expression.

Because many of the early and large tech platforms came from the United States, many scholars believe that early internet culture reflected primarily American values, including the particularly American conception of free speech as a paramount value and a general willingness to allow for companies to innovate in a free market system with limited regulation. In the European Union and internationally, human rights models often strive more to balance competing rights, such as rights to privacy, with rights to free expression. There has also been a history of negative sentiment against U.S. tech companies for their dominant market power, growing political and social influence, and frequent refusals to comply with local laws and norms. Some of the major American tech companies have successfully moved much of their tax flow out of the European Union, which may be one reason why it has ramped up regulation of intermediaries and tech companies in recent years.

The European Union has been growing in influence on intermediary and online speech regulation matters. For example, the Hate Speech Code of Conduct<sup>10</sup> and the Audio Visual Media Services Directive<sup>11</sup> are influential laws imposing duties and obligations on

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<sup>8</sup> See, e.g., *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Center for Democracy & Technology v. Pappert*, 337 F. Supp. 2d606 (E.D. Pa. 2004).

<sup>9</sup> Though the United States has arguably succeeded in exporting some U.S. internet regulations through trade agreements, particularly provisions amounting to compliance with DMCA standards.

<sup>10</sup> See Code of Conduct on Countering Illegal Hate Speech Online, European Commission, May 31, 2016, [https://ec.europa.eu/info/sites/info/files/code\\_of\\_conduct\\_on\\_countering\\_illegal\\_hate\\_speech\\_online\\_en.pdf](https://ec.europa.eu/info/sites/info/files/code_of_conduct_on_countering_illegal_hate_speech_online_en.pdf)

<sup>11</sup> See European Parliament legislative resolution of 2 October 2018 on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM(2016)0287 – C8-0193/2016 – 2016/0151(COD)).

intermediaries. The European Commission has also been quite active on issues concerning copyright, extremist speech, hate speech, and political manipulation in online content.

Intermediary regulation in Europe differs from intermediary regulation in the United States, partially due to different understandings of fundamental rights such as free expression and privacy rights. Broadly speaking, in the United States, the unique “free speech maximalist” culture places great value on free speech and free expression. In the European Union, cultural values focus more on dignitary human rights as a whole, balancing free expression and information rights against other human rights.

Differences in value systems have influenced how the internet has developed. However, participants at this workshop emphasized that it is important to remember that the United States and Europe have more in common than not, at least concerning general human rights values and democratic principles. Focusing too much on the differences can lead to unproductive division of resources and intellectual efforts.

### **Past and Present Themes and Questions**

Participants evaluated the ways in which the intermediary and speech regulation environment has drastically changed in just the past few decades. Since the first developments in intermediary liability law, a number of key changes have occurred that merit attention.

The world of intermediary and speech regulation has expanded. Online speech regulation is no longer solely a U.S. and E.U. matter, but a truly global regulatory landscape. Furthermore, the question today is not simply how to conceptualize and regulate internet intermediaries, but also how to conceptualize and regulate the growing data economy. Internet intermediary debates have transitioned from a focus on content takedowns to now emphasizing topics such as Big Data, machine learning, artificial intelligence, and tools for regulating and enforcing data protection.

In the early days of the internet, many believed that intermediaries served an important function in supporting a free environment for public discourse. While many still believe this today, there is also growing concern over negative effects that some intermediaries may have on public discourse. For example, one negative effect of the rise of intermediaries could be the increased reach of online political disinformation campaigns on social media networks.

If intermediaries continue to exist as relatively open platforms, they may have to practice more gatekeeping functions, possibly including ex ante speech restrictions. This could include, for example, a social media platform blocking certain content from posting to the public view. Increasing the gatekeeping responsibilities of intermediaries may be positive, in that intermediaries could better support a healthy speech environment. On the other hand, this strengthening of intermediaries’ gatekeeping functions could also lead to greater censorship and restrictions on free speech online.

Furthermore, if more mediation of online speech is deemed necessary or beneficial for a healthy speech environment, there is still the question of who should be responsible for determining the standards of online speech. Governments can set these standards through laws and regulation.

Courts can adjust these standards through legal interpretation. Companies themselves can also set standards through platform-specific rules or industry self-regulation. The role of civil society is also important in creating new standards for online speech. The ultimate goal for any new online speech regulation should be to best protect the ability for intermediaries to provide space for free expression online, while still protecting against destructive or harmful speech.

One topic of debate among workshop participants was whether the decentralized model of online speech is still relevant or practicable in today's internet environment – and whether it should be protected in an age of increasing consolidation. The early internet provided space for many small intermediary providers, but today, a number of large companies dominate the online space. As one participant put it, the “edge of the internet” may be lost already. The market dominance of the large tech platforms has affected the online public sphere and will likely continue to do so as platforms grow in size and influence. The centralization of power in a small group of internet companies may be a threat to the decentralized discourse model of online speech.

New solutions may be needed to protect the potential for decentralized discourse on the internet, at risk in today's more centralized internet economy. Some participants suggested that antitrust regulation is a solution, while others argued that this will not solve the core problem and may have additional negative consequences. Others raised the prospect of a blockchain-enabled decentralized web. A few participants also questioned whether the entire conversation around “the distributed web” has changed, and pointed out that the conversation may now be a moot point. The distributed web may no longer even be an actualizable ideal.

### **Changing Political Economy**

A larger systemic question is how the political economy has changed since the early days of internet intermediaries. Many scholars used to believe that intermediaries would allow for free flow of information, regardless of government regulations. However, it is now apparent that intermediary companies must comply with government regulations and often with government requests as well. Effectively, individuals may be losing one check on government regulation of speech through the loss of an unregulated tech industry.

One way states can target regulatory models is to create different regulations for different companies, based on size of company, number of users, market power, or other similar metrics. Large technology companies like the “Big 4” or “GAFA” (Google, Amazon, Facebook, and Apple) have the power to make specific handshake agreements with governments through a diplomacy model of negotiation. These companies can negotiate for favorable exceptions to intermediary liability regulations that may be difficult for other companies to follow. Small companies are unable to negotiate with states on this scale. This makes it difficult for small companies to compete. Perhaps the law can address this disparity and level the playing field by making stratified regulations that target companies based on size or financial status.

Classically, governments set regulations, and companies leave jurisdictions if they dislike the regulations. This is a “capital flow political economy.” However, today, companies often act akin to nation-states. As discussed in Frank Pasquale's work, intermediaries and large tech

companies are now more like market makers and sovereigns, not market participants.<sup>12</sup> The relationship between companies and governments is now more like diplomacy, not capital flow. The model is the relationship between Denmark and Germany, not North Carolina and a furniture manufacturer. Companies and governments engage in negotiation and accommodation. Some participants argued that this is not a new dynamic; when economic power concentrates, there will always be “a dance between government and industry.”

Some participants suggested looking to the GDPR as a model, as it uses a principle-based approach that effectively places greater burdens on larger companies without specifically making distinctions based on size of company. Europe’s proposed Copyright Directive Article 13 also, in some drafts, creates greater responsibilities for “platforms that host a large amount of content.”<sup>13</sup>

### **Government vs. Private Industry**

In recent years, there has been a growing trend of governments leveraging the Terms of Service of internet intermediaries to request that intermediaries take down online content, in lieu of governments regulating the online content or speech directly. Effectively, governments have used and are using corporate terms of service and corporate content takedown mechanisms and processes as a form of indirect speech regulation. Leveraging corporate takedown processes is often faster and easier for governments than going through legal procedures for blocking or removing speech. However, this indirect speech regulation is also much less transparent, and there is little or no accountability or redress for citizens whose speech have been silenced. When states use intermediaries as proxies for speech regulation, this has an impact on rights to free speech and free expression.

In the realm of online speech regulation, it appears that there are two main regulators of speech – companies (through corporate takedown processes) and governments (through direct speech regulation and through leveraging of corporate takedown procedures and other indirect speech regulation). Democratic governments are accountable to their citizens, and corporations are accountable to shareholders and consumers. However, industry is also dependent on the state for regulatory approval, taxes, and so on.

It is simple to default to viewing the speech regulation problem as a dichotomy between government control and industry control. Individuals would then have to decide whether they trust their governments more than they trust tech companies. Ideally, the law should protect against abuses from each. However, there may also be alternative or additional models that include either hybrid state-industry regulatory regimes or models that give greater weight to civil society and to individuals. Some participants argued that this is one reason supporting the need for a vibrant civil society that is not beholden to either the government or the industry. While individuals often can pursue a right of action against private companies, states should also protect individuals’ rights as well. One participant noted that state responsibility to protect individuals’ rights could extend to protecting individuals’ rights against intermediary companies.

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<sup>12</sup> See, e.g., Frank Pasquale, *From Territorial to Functional Sovereignty: The Case of Amazon*, LAW & POLITICAL ECONOMY BLOG (December 6, 2017), <https://lpeblog.org/2017/12/06/from-territorial-to-functional-sovereignty-the-case-of-amazon/> (last visited January 17, 2019).

<sup>13</sup> Directive on Copyright in the Digital Single Market 2016/0280(COD).



## **Black Letter Law and Facts on the Ground**

Different legal and regulatory doctrines can apply when discussing the regulation of intermediaries and online speech. By analyzing failures and noting successes, academics and advocates can create better models for future regulations of online speech.

### **Lessons from Media and Telecom Regulation**

Many believe that online speech regulation can be modeled after or at least take inspiration from media and telecommunications regulation. But, with the rise and ubiquity of internet intermediaries, some have argued that there may no longer be many material differences between intermediaries like Facebook and telecommunications providers like Comcast. However, many participants believed there still to be a difference between internet intermediaries and telecommunications companies. Fundamentally, broadband telecommunications are still essentials, but internet intermediaries have not reached that level of essentiality yet.<sup>14</sup> This could be because these are simply different markets, but also because there is still a lower barrier of entry for market competitors seeking to participate in the internet space versus the telecommunications sector. Thus, while future internet regulations can look to telecom regulations for inspiration, there may not be enough support for entirely regulating these sectors in the same way.

Some participants suggested using a common carrier model for intermediaries who host or provide access to content. Under such a model, the government could mandate that a platform carry content. Consumers could have a right to have their content carried or hosted by an intermediary service and could potentially have a right to consumer protection claims on this matter. However, the common carrier model does not currently apply to user-facing content platforms like Facebook or YouTube and it is unlikely that this model will be transferred whole cloth to intermediary liability law.<sup>15</sup> Furthermore, the terms of service of many intermediaries include mandatory arbitration clauses that could bar some types of consumer protection claims.

### **The E.U. Approach: Human Rights and Consumer Law**

Some participants claimed that, in the European Union, human rights and consumer law are often more intermingled than they are in the United States. Using this approach could allow for regulation of both private companies and non-profits and educational organizations, without necessitating the creation of multiple regulations differentiated by type of intermediary. As one

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<sup>14</sup> See Annemarie Bridy, *Remediating Social Media: A Layer-Conscious Approach*, 24 BOSTON U. J. SCI. AND TECH. L. 193 (2018).

<sup>15</sup> See Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power Over Online Speech*, Aegis Series Paper No. 1902, Jan. 29, 2019, available at <https://www.lawfareblog.com/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech> (last accessed Mar. 8, 2019).

workshop participant noted, “The European approach could be a better approach than simply creating a consumer regulation but putting Github and Wikipedia in a footnote.”

Aleksandra Kuczerawy’s work was widely discussed.<sup>16</sup> Participants especially honed in on the idea that, through the E-Commerce Directive, the European Union is indirectly incentivizing intermediaries to interfere with private speech. There is no explicit mass carrier obligation in the Directive, but there is also no due process for individuals. Thus, there is again the problem discussed in other sessions of indirect speech regulation causing a deficit of due process rights for individuals against the state.

### **The U.S. Approach: The First Amendment and Property Rights**

The property interest runs deep in U.S. First Amendment jurisprudence. Generally speaking, property owners have the right to not have First Amendment speech regulations interfere with their private property rights. If lawmakers seek to apply this to the intermediary context, the key problem then is defining what counts as property or ownership over content or speech online.

There is a line of U.S. cases known as the “shopping mall cases” or “company town cases”<sup>17</sup> concerning the conflict between First Amendment rights and private property rights. In these cases, the Supreme Court considered whether individuals had the right to exercise First Amendment free speech rights while situated in or on the outskirts or private properties that were, to various degrees, open to the public. These cases are relevant to understanding intermediary liability protections. For example, one can easily draw comparisons between a private corporation’s online intermediary platform and a private corporation’s physical shopping mall. Both the intermediary platform and the shopping mall can serve as spaces or venues for speech or expression.

Some cases on First Amendment constraints on government can also be analogized or applied to the notice and takedown process for internet intermediaries. These include *Smith v California*<sup>18</sup> or *Bantam Books v. Sullivan*,<sup>19</sup> in which the Court held that bookstores are not liable for selling books with obscene content.

### **Due Process Concerns**

When governments indirectly regulate private speech by incentivizing, advising, or forcing private companies to take down content, individuals lose due process rights. Users often claim they lack due process when dealing with content platforms. For example, sometimes users argue that they have little recourse when platforms remove their content. However, these intermediaries are mostly private companies, so consumers do not have legal due process rights

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<sup>16</sup>Aleksandra, Kuczerawy, *Safeguards for Freedom of Expression in the Era of Online Gatekeeping*, Auteurs & Media (forthcoming, 2019).

<sup>17</sup> See, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>18</sup> *Smith v. California*, 361 U.S. 147 (1959).

<sup>19</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

as they would against the state.<sup>20</sup> This changes when states pursue indirect private speech regulation, because then individuals should have those rights.

Participants debated whether a “must carry” obligation might be incompatible with due process or might make due process irrelevant. (A “must carry” obligation may make takedowns impossible, thus eliminating the need for a recourse to wrongful takedowns.) The two concepts may exist on opposite sides of a spectrum (between strong government enforcement of speech regulation online and complete libertarian freedom for platforms). Alternatively, some participants argued that a must carry obligation was integral to providing for due process. As one said, “What’s left of due process without ‘must carry?’ Just transparency reports?”

### **Distinguishing Intermediaries and Harms**

One common complaint among the participants was that existing regulations are overly broad. Policymakers should avoid creating overly broad regulations and instead tailor regulations narrowly to best address consumer harms. One way to do this might be to craft regulations that distinguish between types of intermediaries or perhaps between types of harms.

Participants debated the best way to distinguish between different types of intermediaries, for the purpose of properly tailoring regulations to address harms. One option is differentiating by size. There are a few reasons this could be useful. Larger companies may have more resources and more political power, making them uniquely able to comply with more stringent rules. There may also be greater need to regulate companies as they grow more powerful. Intermediaries with greater numbers of users may deserve more regulation (or more stringent regulation) for similar reasons, as well as the simple fact that more consumers will be affected or protected by regulations aimed at large companies or companies with large user bases. However, differentiating intermediaries by size is difficult. It is unclear where to draw the line. Additionally, a smaller company or one with fewer users might still have deep impact on users and ability to harm or protect users.

Another option for tailoring regulations is to craft regulations tailored toward protecting or managing different types of speech. For example, there could be regulations specifically aimed toward regulating defamation, child protection issues, and so on. Many jurisdictions already have laws like this. In the United States, broadly speaking, there are some established laws for types of harms, including intellectual property infringement and online defamation. These regulations do not affect First Amendment rights. This is one model for looking at future speech regulations.

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<sup>20</sup> Some participants suggested that states should incentivize platforms to create procedures for due process concerning user speech; states can do this by offering legal immunity for platforms that provide such rights for users.

## **Moving EU-US Dialogues Forward**

In this session, participants discussed strategies to reconcile differences between America and Europe, with the goal of making better regulations moving forward. Of great debate was the question of who should make decisions for regulating speech: governments or “the market.” Some participants noted that “the real fear is when they act together.”

### **International Cooperation**

It is possible to create international standards for speech regulation. Collaboration between countries on some speech issues can be helpful. For example, states often collaborate on investigations for violent extremism and child protection related content. However, others argued that there was a lack of transparency in many of these multi-stakeholder processes. Additionally, if different jurisdictions develop different regulations, states may have incentive to simply turn over certain cases to other countries to achieve the same objectives while avoiding a state action problem.

While one participant offered ICANN as a model for international cooperation, others noted that the organization lacked transparency, with “entire domains disappearing all the time.” Though ICANN may be an imperfect organization, it does provide an example of internet governance on a global scale.

### **Prior Restraint**

Of much discussion was the phenomenon of states using intermediaries to regulate private speech, effectively a form of prior restraint. This can be in the form of governments directly asking intermediaries to take down certain pieces of content. Another method often used by states is when states refer to a company’s own terms of service and recommend (either directly, or through a third party) that pieces of content be taken down, not for violation of law, but for violation of terms of service. Some of the third parties often used in these scenarios include relatively neutral NGOs. Often, these include Internet Research Units (IRUs).

Most agreed that government use of terms of service for content takedowns was a negative form of prior restraint of speech. This form of speech regulation without judicial oversight has negative consequences for free speech and free expression rights, both in the United States and European Union.

Another permutation of this form of prior restraint occurs when states give notice to companies that content may be illegal, but this notice does not include any formal determination of legality or any recommendation for the company. Technically, the company then can still make its own determination and does not have to take anything down. However, if the content does turn out to be illegal, and the company did not take it down, the state can say that the company had notice. Thus, effectively, the state is still regulating private speech through the intermediary companies.

## **Practical Strategies**

Participants discussed practical strategies to push against the growing trend of governments using intermediary takedowns as a form of private speech regulation. Participants generally agreed on three main immediate strategies: (1) calling for greater government transparency, through the FOIA process or through NGO audits; (2) working with companies to gather information, for use in academic and policy research; and (3) advocating for individuals and groups who have been disproportionately harmed. Additionally, other forms of advocacy were also suggested, including amicus briefs, policy papers, and impact litigation.

The first problem to solve is how to obtain evidence concerning platforms' content removal efforts and the relative role of state and private actors. Information would be needed regarding content takedowns (number, source, scale, type, reason, third party involvement), handshake agreements between states and companies, and impact on users (for example, whether speech was chilled). Some participants suggested using FOIA to find out what information is being taken down at government request. However, others demurred, noting that the FOIA process was often slow and inefficient and it would require knowing exactly which agencies were requesting which content removals from which companies. Also, others noted that much of the information would likely not be made publicly available, especially given existing statutory exceptions (particularly those related to extremism). Ultimately, most agreed that it was still one helpful avenue of approach.

Participants also suggested working with affected companies, both for information gathering and to advocate for better policies and processes. Companies could provide as much information as they are legally allowed on takedown requests from governments or from known third parties used in these processes. A neutral third party, potentially an academic center or NGO, could then collect and publish the data from multiple companies. This would allow for more informed research. With the actual numbers, advocates would have stronger cases for impact litigation and for policy proposals. Some positive examples of transparency projects include the Lumen database and the U.K. audit of the Internet Watch Foundation. One particularly important object of additional transparency and scrutiny would be the terrorism hash database.

For impact litigation, some participants suggested that the ideal plaintiffs would be smaller intermediaries, which are impacted by these processes but, unlike larger ones, do not have the ability to negotiate their own arrangements with states. Participants noted that the United States was probably not the best first choice for impact litigation, possibly simply because the United States has a longer history of intermediary liability and speech law. This longer history of laws and greater number of cases on these issues may make future litigation more complicated. Some suggested Germany, due to beneficial case law on fundamental rights. The Dutch Constitution also has an absolute ban on prior restraint on speech, which could make the Netherlands a strong candidate for impact litigation.

# **Future Models for Private Speech Regulation**

## **Information Fiduciaries**

Participants discussed the “information fiduciaries” model of intermediary and online speech regulations. This conceptual model was developed by Jack Balkin<sup>21</sup> and refined with collaboration from Jonathan Zittrain and others.<sup>22</sup> Essentially, the model places fiduciary-like duties on intermediary platforms – duties of care, confidentiality, and loyalty to users. This is due to the relationship platforms now have with users. Users trust platforms to handle great amounts of private data; therefore, platforms are already acting in a quasi-fiduciary capacity.

There was some debate as to whether the information fiduciary model would impose any obligations on platforms for content moderation. While some participants believed that content moderation obligations should follow from fiduciary responsibility, others disagreed. They believed that platforms only have an obligation to not engage in “data manipulation,” which Balkin has defined as the use of data to benefit platforms while simultaneously exploiting and harming users. Balkin has noted that content moderation is only relevant insofar as content moderation policies involve deliberate manipulation of end users and/or promote end user addiction. However, others argued that that definition was too limited and that fiduciary duties should be construed more broadly to include content moderation.

Some disagreed with the information fiduciary model, arguing that companies already have duties of care toward consumers, under existing bodies of law. Others noted that duties of care and loyalty to users may sometimes conflict. For example, a platform attempting to satisfy a duty of care might have a responsibility to give users “good” or “safe” content only. But the same platform, attempting to satisfy its duty of loyalty, might instead choose to simply give the user content that the user wants or expects to see. Another question concerns how companies might balance duties to consumers with human rights; fiduciary responsibilities may imply that platforms owe more to their users than to universal human rights.

Legally, some argued that fiduciary duties could create groundwork for governments to regulate more because this could bring online speech into the realm of contract law. One participant offered a tongue-in-cheek response: “How do we contract around the First Amendment?”

## **New Sources of Remedy for Harms**

There will always be room for new models for regulating any sector. As one participant noted, “the law tends to want to provide a remedy for harm.” In the past, governments could regulate content producers for content-related harms. However, today, these content makers no longer are the ones with money or power; they cannot as readily be called upon to remedy harms. Instead,

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<sup>21</sup> See, e.g., Jack Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016).

<sup>22</sup> See, e.g., Jonathan Zittrain, *How to Exercise the Power You Didn't Ask For*, HARV. BUS. REV. (Sep. 19, 2018), <https://hbr.org/2018/09/how-to-exercise-the-power-you-didnt-ask-for>.

intermediaries have the financial and political power. Thus, it is likely that motivated plaintiffs – and hence the law – will adapt and find a new source for remedy.

### **Evaluating New Models**

Participants disagreed on whether the GDPR was a good model for future speech regulation. However, most agreed that the GDPR was a strong model, at least in terms of successful procedural creation of a new regulation with international reach. Advocates can learn from the process of GDPR's creation in calling for and crafting new standards.

Some noted that future regulations should embrace functional distinctions between types of intermediaries or types of harms – essentially, that regulations were overbroad. Others remarked that regulations were instead not broad enough, that they ought to focus more on big picture issues, not on “odd little bits of bad content.”

There are a number of regulations in the European Union (and in some other jurisdictions) that require companies to take down problematic content such as hate speech or extremist content very quickly. There was general agreement that regulations calling for very fast content takedown timelines would likely fail in the long term, as it is difficult for most companies to comply with such regulations. However, governments and policymakers often face political pressure to solve problems related to concerns like intellectual property infringement and extremism. This is likely what sparks many of the overly simplistic regulations that call for companies to take down content as fast as they can. These regulations may be short-sighted.

### **Systemic Solutions**

Some participants argued that regulations should focus on systemic or architectural changes that platforms could implement, not pieces of content.

One concept currently of discussion in Europe is imposing a new duty of care for platforms – essentially, making platforms face legal consequences for having inadequate overall systems and processes, not for the inevitable individual failures where bad content stays up. This concept of duty of care could align with the information fiduciaries framework. Regulations focused on these overall duties would likely require or incentivize systemic or architectural solutions.

Regulating on the systemic level could be easier and more effective than attempting to regulate content, as content regulation runs into many issues with speech and expression rights. For example, there could be new regulations specifically mandating impact assessments for algorithms in content moderation. This would be a discrete, specific regulation that would target a known harm with relatively practical steps to ameliorate.

On a practical level, some participants asked how architectural solutions could be operationalized. One example of an architectural solution could be creating a hate speech detecting algorithm that would then trigger a pop-up asking the user, “Are you sure you want to say this?” It remains to be seen how platforms might be encouraged or forced to implement architectural solutions. Governments could create incentives to persuade platforms to enact these

high-level changes. Public consumer pressure may also incentivize companies to implement these solutions.

Many believed in the importance of existing procedural frameworks, including transparency reporting and risk management procedures for platforms. Additional proposed solutions included: a system of random audition, where one of every hundred content takedown decisions gets reviewed by a court or other outside body; new impact assessments for types of content or for types of moderation, such as algorithmic moderation; enforcing transparency in terms of service; and creating algorithms “that work in the public interest” to check algorithms used in content moderation.



## Conclusion

American and European lawyers and legal scholars have much to learn from each other concerning legal and policy issues related to intermediary liability and online speech regulation. While the development of the early internet and many of today's large tech platforms may reflect primarily American values (particularly regarding free speech and limited regulation innovation), today's internet ecosystem is also shaped by the growing influence of the European Union. While the United States tends toward a free speech maximalist culture, Europe tends to focus on dignitary human rights, balancing free speech and expression rights against other human rights. However, participants at this workshop emphasized that the United States and Europe have more in common than not, at least concerning general human rights values and democratic principles. Focusing too much on the differences can lead to unproductive division of resources and intellectual efforts.

Since the first developments in intermediary liability law, a number of key changes have occurred that merit attention. Online speech regulation is no longer solely a U.S. and E.U. matter, but a truly global regulatory landscape. Furthermore, the question today is not simply how to conceptualize and regulate internet intermediaries, but also how to conceptualize and regulate the growing data economy. Further research should be done to expand the scope of these discussions to other regions of the world as well.

Today, there is growing concern over negative effects that some intermediaries may have on public discourse. If intermediaries continue to exist as relatively open platforms, they may have to practice more gatekeeping functions. However, this could lead to problems due to lack of due process or transparency. Large tech companies often act akin to nation-states, with the largest intermediary companies having as much negotiation power as nation-states. The increasingly disparate power of a few large tech platforms may also lead to a loss of decentralized discourse and increased difficulties for new competitors to enter the market. Perhaps the law can address this disparity and level the playing field by making stratified regulations that target companies based on size or financial status.

In the realm of online speech regulation, it appears that there are two main regulators of speech – companies (through corporate takedown processes) and governments (through direct speech regulation and through leveraging of corporate takedown procedures and other indirect speech regulation). Ideally, the law should protect against abuses from each. However, there may also be alternative or additional models that include either hybrid state-industry regulatory regimes or models that give greater weight to civil society and to individuals.

Policymakers should avoid creating overly broad regulations and instead tailor regulations narrowly to best address consumer harms. One way to do this might be to craft regulations that distinguish between types of intermediaries or between types of harms. Another option for tailoring regulations is to craft regulations tailored toward protecting or managing different types of speech. Future regulatory models for protecting free expression online can look to: U.S. legal concepts from media and telecommunications regulations, including the “must carry” obligation and consumer protection law; U.S. First Amendment and property law doctrine; European

human rights law regarding freedom of expression; and precedent from both the United States and Europe regarding due process. Other new models that can be useful in shaping future regulation include the information fiduciaries model and parts of the GDPR. Another option could be incentivizing systemic, architectural solutions on the part of companies.

One problem for free speech rights is the phenomenon of states using intermediaries to regulate private speech, effectively a form of prior restraint. Effectively, governments have used and are using corporate terms of service and corporate content takedown mechanisms and processes as a form of indirect speech regulation. This indirect speech regulation is also much less transparent, and there is no accountability or redress for citizens whose speech has been silenced. When states use intermediaries as proxies for speech regulation, this has a negative impact on rights to free speech and free expression. Practical strategies to fight against this problem include: (1) calling for greater government transparency, through the FOIA process or through NGO audits; (2) working with companies to gather information, for use in academic and policy research; and (3) advocating for individuals and groups who have been disproportionately harmed. Additionally, other forms of advocacy were also suggested, including amicus briefs, policy papers, and impact litigation.

Europe and the United States must work together to protect online free expression and access. By analyzing failures of existing regulations and noting successes, academics and advocates can create better models for future regulations of online speech. Regulatory solutions for online speech issues must address the entire internet ecosystem. The ultimate goal for any new online speech regulation should be to best protect the ability for intermediaries to provide space for free expression online, while still protecting against destructive or harmful speech. Future international standards must also include perspectives from other nations and regions, as the internet is global. Collaboration between countries on online speech issues can be helpful and should be encouraged.

## **Workshop Agenda**

*This detailed agenda includes framing discussion prompts and related questions. The discussion prompts and questions served as reference or inspiration for conversations.*

### **Session 1 : Free Expression Protections and Intermediary Liability**

*Discussion Leads: Martin Husovec, Daphne Keller*

At the heart of the debate about intermediary liability and speech protections are a number of legal and constitutional questions. These include: the scope of fundamental rights protections; the question of state action and the delineation of public and private power; and the role that law has to play, alongside other forms of governance, in establishing the relationships among states, internet intermediaries and speakers.

- What elements and requirements in intermediary liability law follow from constitutional and human rights law, and how does the former inform the latter?
- What limits, if any, do constitutional and human rights frameworks place on laws that lead private platforms to silence lawful speech (i.e., privatized enforcement)?
- Can states effectively bypass limitations on their own authority by delegating regulatory responsibility to private companies without appropriate safeguards?
- What distinctions can be made between different types of speech intermediaries and their different responsibilities? On what basis should those distinctions be drawn?
- What are the value and relevance of distinctions in existing safe harbors, like CDA230, DMCA, and ECD? What are the value and relevance of the distinctions predating those laws? For example, one distinction is that between carrier, distributor, editor.
- What are the implications of the cross-border nature of online speech platforms? What limitations follow from jurisdiction?

### **Session 2: Black Letter Law and Facts on the Ground**

*Discussion Leads: Daphne Keller, Joris van Hoboken*

Building on the first session's discussion of constitutional and fundamental rights, this discussion will examine how those rights are protected -- or not -- by black letter legal doctrines and current platform and government practices. Discussion will cover, among other things, legal theories to challenge or defend state and private exercises of power over online expression.

- How do specific doctrinal aspects of intermediary liability law -- including takedown procedures and concepts of "knowledge" or "neutrality" -- affect internet users' free expression rights?
- Are there persuasive rights-based arguments against laws requiring platforms to use technical filters to automatically block content?

- Can platforms be First-Amendment-protected speakers in cases defending their right to remove user-generated content, but also assert immunity as intermediaries when they fail to remove content? How does the European version of this dispute play out?
- Does the law put any limits on the rules that platforms can incorporate in their Community Guidelines or Terms of Service? Should it?
- Do doctrines from other areas of law, including telecommunications, media regulation, and antitrust, help in answering these questions?

### **Session 3: Moving EU-US Dialogues Forward**

*Discussion Leads: Martin Husovec, Tiffany Li*

In this session, we will look at what Europe and America can learn from each other, based on the discussions that we had in previous sessions. We will highlight and discuss commonalities and differences in E.U. and U.S. approaches to constitutional protection of speech. In particular, we will look at how lines of argumentation, legal concepts, and practical implementation of laws compare in the transatlantic context.

- Do legal regimes in Europe and the United States conceptualize delegation of enforcement in the same way? Does the constitutional scrutiny differ depending on whether the state acts only by means of incentives, rising eyebrows, direct informal pressure, else? Does algorithmic enforcement require a distinct approach?
- How can we effectively separate delegated enforcement and private ordering of content in the constitutional analysis? Where and how should we draw a line?
- Do situations when the general monitoring obligation would violate free speech standards differ in Europe and the United States?
- Is the European concept of positive obligations present in U.S. law? If not, what supplements its role? Do different policy areas such as hate speech, terrorist content, and copyright infringement require different types of analysis?

### **Session 4: Future Models for Private Speech Regulation**

*Discussion Leads: Tiffany Li, Joris van Hoboken*

This session will focus on future or alternative models of intermediary liability and private speech regulation, including extension or expansion of current models of speech regulation. Regulatory models for discussion will include but not be limited to: common carrier models, antitrust regulation, information fiduciaries, multi-tier regulations for intermediaries by type, hybrid public-private models, and more. If time allows, we will also share practical policy strategies to advocate for new or improved regulatory models.

- What is missing in current legal and policy frameworks for intermediary liability and private speech regulation? What has changed about society or technology that demands a change in regulatory models?

- What problems should future intermediary and speech regulation frameworks seek to solve? What values should they uphold or protect? How are these problems and values different from the problems and values that guided the development of the early intermediary liability regimes?
- How should new frameworks take into account existing problems with intermediary liability regulations? Existing problems may include the problem of scale, jurisdictional conflicts, and the threat of Splinternet.
- What are current trends (positive and negative) in intermediary liability and private speech regulation? What is working and what isn't working? Are different jurisdictions moving toward similar shifts in intermediary regulation?
- What are practical strategies to influence the development of future regulatory models for intermediary regulations in America and Europe?

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## **Workshop Organizers**

### **Wikimedia/Yale Law School Initiative on Intermediaries and Information**

The Wikimedia/Yale Law School Initiative on Intermediaries and Information is a research initiative that aims to generate awareness and research on intermediary liability and other issues relevant to the global open internet. WIII grew out of an ongoing academic affiliation and collaboration between Yale Law School's Information Society Project and the Wikimedia Foundation and is made possible, in part, by funding from the Wikimedia Foundation, in support of Wikimedia's mission to build a world in which everyone can freely share in knowledge.

### **Stanford Center for Internet and Society**

The Center for Internet and Society (CIS) is a public interest technology law and policy program at Stanford Law School and a part of Law, Science and Technology Program at Stanford Law School. CIS brings together scholars, academics, legislators, students, programmers, security researchers, and scientists to study the interaction of new technologies and the law and to examine how the synergy between the two can either promote or harm public goods like free speech, innovation, privacy, public commons, diversity, and scientific inquiry. CIS strives to improve both technology and law, encouraging decision makers to design both as a means to further democratic values. CIS provides law students and the general public with educational resources and analyses of policy issues arising at the intersection of law, technology and the public interest. CIS also sponsors a range of public events including a speaker series, conferences, and workshops. CIS was founded by Lawrence Lessig in 2000.